

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

2. Respondents failed to file their verified response. As a result, the Department filed a petition with the Illinois Human Rights Commission ("Commission") for a default order. On October 21, 2009, the Commission entered its default order against both Respondents and ordered its administrative law section to conduct a hearing on Complainant's damages.

3. From February 2007 through November 2007, Complainant rented a one bedroom mobile home at \$500.00 per month for herself and her three children, ages 7, 8 and 15 years old. Reach was her landlord.

4. In June 2007, Reach offered, and Complainant accepted, an employment arrangement with Reach for housing.

5. Complainant worked in an administrative capacity with Reach's U-Haul business located in the Ferris Motel office. Complainant also performed administrative and cleaning duties for the Respondent, Ferris Motel, and on occasion, provided home care for Reach's ailing Mother, until her death in September 2007.

6. Reach was Complainant's supervisor for all employment tasks.

7. In November 2007, Reach offered, and Complainant accepted, a three bedroom, double wide mobile home, in exchange for her continued employment. The housing was in substitution for wages. Housing also included utilities. The total housing for employment package was valued at \$800.00 per month.

8. In January 2008, Complainant was allowed to take a six week medical leave from her employment duties after her surgery without affecting the parties' housing for employment arrangement.

9. On March 30, 2008, Reach texted Complainant by use of his telephone and requested that she be his "girlfriend."

10. Complainant turned down Reach's offer to be his "girlfriend" and described him as her "friend." Reach's request was not repeated again.

11. Complainant testified that she neither presumed nor understood Reach's text request

to be his "girlfriend" was meant to be sexual in nature.

12. From March 30, 2008 through July 2008, Reach's demeanor became more confrontational. Reach on a number of occasions loudly chastised Complainant's children, he ceased discussing business decisions with Complainant, he interfered with Complainant's harvesting her garden and generally became rude toward her in public.

13. In July 2008, Reach made a decision to discontinue his business relationship with U-Haul.

14. In July 2008, Reach discharged Complainant, because "he was shutting down the U-Haul operation."

15. Complainant was also discharged from any duties with Respondent Ferris Motel in July 2008.

16. Complainant found employment in October of 2008.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter.

2. At the time of the incidents complained of, Complainant was an "individual" as defined in Section 2-101(E) of the Illinois Human Rights Act ("Act") and was covered by the provisions of the Act.

3. At the time of the incidents complained of, Respondent, Ferris Motel, was an employer defined in Section 2-101(B) of the Act.

4. At the time of the incidents complained of, Reach was Complainant's "supervisor" as defined in Section 2-102(D) of the Act.

5. Respondent, Ferris Motel, failed to respond to Complainant's charge of sexual harassment and retaliation filed with the Department; therefore, all the allegations contained therein are deemed admitted as true.

6. In accordance with the Commission's default order, Respondent is liable for its

violations of the Act that prohibit discrimination based on sexual harassment in employment (Section 2-102(D)) and retaliation (Section 2-102 & 6-101) of the Act.

7. An argument based on the evidence cannot be made if the argument is an affirmative defense that should have been properly pled.

8. Complainant has not proven by a preponderance of the evidence that she has suffered emotional distress from the actions of Respondent of such magnitude that she is entitled to an award of emotional distress damages.

DISCUSSION

Sexual Harassment and Retaliation

Since the Commission's October 21, 2009, default order there has been a finding of liability against Respondent, Ferris Motel. As a result of the default, the allegations of the Charge are deemed admitted. Section 7A-102(B). Based on the evidence, Complainant sustained actual damages.

Actual Damages

The Act provides for an award of actual damages. Section 5/8A-104(B). Actual damages include "indemnification for inconvenience, mental anguish, humiliation, embarrassment, expenses, and deprivation of Constitutional rights." Ayers and Johnson, IHRC, ALS No. 3375 (K), October 3, 1991, quoting, Moorhead v. Lewis, 432 F. Supp. 674 (N.D. Ill. 1977).

Back Wages

It is the Commission's charge to make the prevailing complainant whole. Complainant is eligible for back pay consisting of the difference between what she should have received in salary, but for the conduct of respondent, and the amount actually received through other employment during the applicable time period. Brown and American Highway Technology, IHRC, ALS No.10805, January 2, 2003.

Complainant requested back wages in the amount of \$2,000.00. The calculation of back wages is problematic as Complainant was paid the equivalent of \$800.00 per month in rent and utilities for her employment services. Both parties agreed to the \$800.00 per month value through their testimony, thus that figure will be used as Complainant's base pay amount per month.

Complainant performed administrative and cleaning duties for Respondent, Ferris Motel, but she also performed office duties for Reach's U-Haul business, as well as home care tasks for Reach's mother. Neither Respondent, Ferris Motel, nor Gordon Reach attempted to differentiate the percentage of employment services performed by Complainant exclusively for Ferris Motel or for the benefit of Reach at the hearing. Although employment tasks assigned to Complainant varied, the assignor was consistently Reach.

As Respondent did not plead that it had a legitimate non-discriminatory reason for Complainant's discharge in July 2008, it is unnecessary to discuss it here for purposes of back wages. Retaliation is presumed as Respondent's motivation. Also, in light of Reach's tactical behavior to coerce Complainant out of her residence, it would be difficult to conclude Complainant enjoyed the use of her home during the months of July 2008 through mid-September 2008. Therefore, Complainant was unemployed for approximately two and one-half months from July 2008 to mid-October 2008, the month when she found employment.

All ambiguities, when calculating back pay, are in favor of the prevailing Complainant. Clark v. Illinois Human Rights Commission, 141 Ill.App.3d 178, 490 N.E.2d 29 (1st Dist.1986)

Based on the two and one-half months during which Complainant was unemployed at a commensurate amount of \$800.00 per month, I recommend a total back pay amount of \$2,000.00.

Therefore, I recommend Respondent, Ferris Motel, is responsible for \$500.00 of back wages to Complainant. That figure equals twenty-five per cent of recommended back wages

due to Complainant. The remainder to be discussed in the decision under the Aud and Gordon Reach decision, ALS No.09-0565.

Emotional Distress

Complainant alleged she suffered emotional distress because of sexual harassment and retaliatory conduct, and requested an award to compensate her for this injury. The Act permits monetary damages for emotional distress, using the totality of the circumstances analysis.

Village of Bellwood v. Illinois Human Rights Commission, 184 Ill.App.339, 541 N.E.2d 1248 (1st Dist.1989).

The act of violating a person's civil rights, by itself, is insufficient to support an award for emotional distress damages. Garritty and Lockett, IHRC, ALS No. 6389, May 3, 1996. "The probative factors in determining the amount of an emotional distress award are the nature and duration of the suffering experienced by the complainant." Gipson and H.P. Mechanical, Inc., and Steve Hathorne, IHRC, ALS No. 06-06C, August 3, 2007. When reviewing the facts, it is not respondent's conduct *per se*, but rather the reaction of a complainant to the respondent's conduct, that justifies emotional distress damages award. Morris and Kentucky Fried Chicken, IHRC, ALS No. 06-134, October 1, 2006.

As noted above, in Bellwood, as here, it was a case in which no medical evidence was adduced.

In this case, it is not necessary to discuss the elements of sexual harassment and its burden-shifting framework. It is further unnecessary to review Reach's reason for Complainant's employment termination, the death of his mother and/or the end of his U-Haul business, and whether those reasons were a pretext for illegal retaliation. The Commission's default order made all those issues moot.

Sexual Harassment-Employment

Although the allegations of the charge of sexual harassment are deemed admitted as

facts pursuant to Section 8A-102(D)(4), and liability existed against Respondent, Ferris Motel, since the default order of October 21, 2009, it is still a prerequisite to review the "nature and duration of the suffering" experienced by the Complainant, prior to any recommendation of emotional distress damages.

A review of Complainant's first charge, "sexual harassment in employment," is void of any specific facts of unwelcome sexual conduct initiated by Reach, individually or as her supervisor. It merely recited legal conclusions that she was "subjected to sexual harassment," it was "offensive," she "rejected his advances, and refused to surrender to his continuing hostility."

The testimony of Complainant during the damages hearing of March 5, 2010, revealed the "nature and duration" of the alleged sexual harassment suffered by the Complainant was limited. In both Complainant's direct and cross examination, she testified that Reach's act of sexual harassment was a single text she received from him on her phone on or around March 30, 2008, asking her to be his "girlfriend." Complainant testified that her response to Reach's invitation was that she considered him a "friend." Complainant also admitted that the text was "not sexual in nature" and that she did not "interpret" it as sexual in nature. Reach never raised the issue of Complainant being his "girlfriend" again.

Complainant did not submit any evidence that would cloak the seemingly innocuous label of "girlfriend" with a sinister connotation that would rise to that level to cause emotional distress. The common usage of the term is neutral.

The weight of the evidence of the record, facts admitted by the default order and the testimony at the hearing concerning the nature and duration of the alleged act of sexual harassment in Complainant's employment fail to support an award for emotional distress.

Therefore, I find that no award for emotional distress damages for the count of sexual harassment in employment is fair and reasonable under all of the circumstances presented by this case.

Cease and Desist

Since default orders have been entered and there has been a finding of liability against Respondent, Ferris Motel, it is recommended that Respondent be ordered to cease and desist from violating the Act in the future.

Prejudgment Interest

Respondent, Ferris Motel, should also be ordered to pay Complainant interest on the back wages.

RECOMMENDATION

Based upon the foregoing, it is recommended that an order be entered awarding Complainant the following relief:

1. Order Respondent, Ferris Motel, to pay Complainant back wages in the amount of \$500.00.
2. Order Respondent, Ferris Motel, to pay Complainant prejudgment interest on the back wages to be calculated as set forth in 56 Ill. Admin. Code. Sec. 5300.1145;
3. Order an award of zero to Complainant for sexual harassment discrimination, emotional distress, in an employment setting;
4. Order Respondent Ferris Motel to cease and desist from sexual harassment and retaliation in its employment practices;
5. Respondent, Ferris Motel, is to pay its share of Complainant's reasonable attorney's fees and costs incurred in prosecuting this matter, and that amount is to be determined after review of a motion and affidavit as per Section 8A-104(G) and pertinent case law; Complainant's motion and affidavit are to be filed on or before July 18, 2010; failure to submit such a motion will be seen as a waiver of attorney's fees and costs;
6. If Respondent, Ferris Motel, contests the amount of requested attorney's fees and

costs, its written response shall be filed on or before August 9, 2010; failure to file a response will be taken as evidence that Respondent does not contest the amount of fees and costs petitioned by Complainant;

7. The recommended relief in paragraphs 1 through 3 is stayed pending issuance of a Recommended Order and Decision with the issue of attorney's fees resolved.

HUMAN RIGHTS COMMISSION

BY: _____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: June 4, 2010

3. Complainant, E. Elizabeth Lewis, retained Speir and Whitney, a law firm, in 2009, to represent her before the Illinois Human Rights Commission ("Commission").

4. Complainant's attorney, Richard J. Whitney, provided a proper affidavit listing the legal services he performed and costs spent on behalf of Complainant.

5. The hourly rate for Richard J. Whitney was \$150.00. The hourly rate for Brenda Rybak, paralegal, was \$75.00.

6. Richard J. Whitney spent 24.87 hours on this matter.

7. Brenda Rybak spent 17 minutes on this matter.

8. The amount of legal fees is \$3,455.75.

9. Costs in this matter total \$270.00

CONCLUSIONS OF LAW

1. A prevailing complainant may recover reasonable attorney's fees and costs.

2. The requested hourly rate of attorney's fees, costs and the number of hours expended for this legal matter are reasonable and customary in Southern Illinois.

DISCUSSION

Once a finding was made that Respondent violated the Illinois Human Rights Act ("Act") and Complainant's damages had been determined, the only issue remaining was the amount of attorney's fees and costs that should be awarded to Complainant under Section 8A-104(G) of the Act.

Complainant's petition seeks \$3,455.75 in attorney's fees and paralegal fees and \$270.00 in costs.

The purpose of the attorney's fee provision of the Act is to ensure that attorneys who practice before the Commission are adequately compensated for their services. Lieber and Southern Illinois University Board of Trustees, IHRC, ALS No. 884, September 25, 1987. In Clark and Champaign National Bank, IHRC, ALS No. 354(J), July 2, 1982, the Commission set out factors to consider when awarding fees and costs. The Commission looks to the experience

of the attorney, the customary hourly fees for similar legal services in that locale, and the time spent furthering the case.

The firm of Speir & Whitney, specifically Richard J. Whitney, had provided an adequate affidavit which established that the legal services he performed and the amount charged in fees were reasonable and customary for Southern Illinois. Richard J. Whitney performed 24.07 hours for Complainant's case, which included his preparation for the public hearing, litigating at the public hearing and writing a post hearing brief. A reasonable amount of time was spent in this case.

Therefore, the total amount of \$3,455.75 for attorney's fees is reasonable for these cases.

The Act also authorizes recovery of costs as per Section 8A-104(G). Complainant's attorney claims various out of pocket costs incurred in representing Complainant in this matter:

Phone - .60;
Copying - 75 at .07 = \$5.25;
Fax - 21 at \$1.00 = \$21.00;
Transcript - \$243.00
\$270.60

The Commission has also routinely held that charges such as photocopying are routinely denied, unless those expenses are billed to the client. It is presumed that these expenses are considered overhead and reflected in counsel's hourly rate. Harrell and Barber-Colman Co., n/k/a Invensys Building Systems, Inc., IHRC, ALS No. 9911, December 21, 2001.

Complainant's attorney has stated, in the fee petition, that the above costs were charged to the client.

Therefore, the amount of \$270.60 for costs is reasonable for these cases.

Since the issues and facts were essentially related to one another, ALS No. 09-0564 (Aud and Ferris Motel) and ALS No. 09-0565 (Aud and Gordon Reach), the amount of attorney's fees and costs recommended should be divided equally between the two cases, but the total amount should be granted.

RECOMMENDATION

Based on the foregoing, it is hereby recommended that:

1. Complainant's petition for fees and costs be granted;
2. Respondent be ordered to pay Complainant the amount of \$1,727.88 as attorney's fees in the matter of Aud and Farris Motel, ALS No. 09-0564;
3. Respondent be ordered to pay Complainant the amount of \$135.30 as costs in the matter of Aud and Farris Motel, ALS No. 09-0564.

HUMAN RIGHTS COMMISSION

BY: _____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: September 13, 2010